

## FINANCIAL MARKETS LAW COMMITTEE

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### ISSUE 56: EMERGENCY POWERS LEGISLATION

Note of a meeting held at Morgan Stanley, 31 March at 4.30 p.m.

#### Present:

Keith Clark, FMLC (Chair)  
Pauline Ashall, Linklaters  
Peter Beales, LIBA  
William Courtney, London Stock Exchange  
Mark Evans, Travers Smith Braithwaite  
Simon Hills, BBA  
Piers Le Marchant, Lehman Brothers  
Julie Patterson, IMA  
Richard Slater, Slaughter and May

Martin Thomas, FMLC Secretary  
Chris Bates, Clifford Chance  
David Bloom, HSBC  
Christopher Crozier, Morgan Stanley  
Jeffrey Golden, Allen & Overy  
Roger Jones, APACS  
Richard Metcalfe, ISDA  
Michael Raffan, Freshfields Bruckhaus Deringer  
Richard Tredgett, Allen & Overy

#### Unable to attend:

Bill Tudor John, FMLC  
Patricia Duncan, FOA  
Tim Herrington, Clifford Chance  
Marc Leppard, IPE  
Laurence Walton, Euronext Liffe

Lachlan Burn, Linklaters  
Alastair FitzSimons, CREST  
Andrew Lamb, London Clearing House  
Diarmuid O'Hegarty, London Metal Exchange

#### Background

On 25 February HM Treasury asked the FMLC to consider their consultation paper<sup>1</sup> released that day on measures that might be taken in the City in an emergency, "The Financial System and Major Operational Disruption". The paper seeks views both on strengthening of private sector "market-based" approaches to major disruption and on whether new statutory powers to suspend obligations and to direct "financial infrastructure" entities might be useful in extreme circumstances.

On 13 March the FMLC chaired by Bill Tudor John convened a preliminary discussion with some of those listed above. The main views exposed in that meeting were that the wholesale financial markets are too interconnected internationally for the foreign dimension to be ignored; that the case is not yet made out that legal uncertainties resolved by the proposed powers would outweigh those created by

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<sup>1</sup> [http://www.hm-treasury.gov.uk/consultations\\_and\\_legislation/major\\_operational\\_disruption/consult\\_operationaldis\\_index.cfm](http://www.hm-treasury.gov.uk/consultations_and_legislation/major_operational_disruption/consult_operationaldis_index.cfm)

them: that no-one knows how matters would proceed if there were major disruption as the law and standard market contracts stand; that there is indeed more to be done in market-based approaches to catering for major disruption; that the FMLC might be an appropriate group to have a role in facilitating a City-wide perspective.

The matter was discussed by the FMLC at its meeting on 20 March. The feeling was that there are arguments for and against the proposed legislation, neither being wholly assessable without clearer understanding of how matters lie as regards drafting currently used in market dealings and powers available to public authorities, so as to discover if and where there are gaps in preparedness, and that the FMLC has a role to play in facilitating a City-wide perspective. Therefore it was decided to convene a further meeting with a wider grouping of market experts, at which the discussion may be summarised as follows.

### **Summary of discussion**

The case is not yet made out that legal uncertainties resolved by the proposed powers would outweigh those created by them. Arguments for and against the proposed legislation cannot be assessed without clearer understanding of how matters lie as regards drafting currently used in market dealings and powers available to public authorities. Therefore there is indeed more to be done in developing market-based approaches to catering for major disruption. An analytical exercise is needed - a 'gap analysis' - to identify whether and if so how there are gaps in preparedness.

Such an analysis must be conducted from a City-wide perspective, and include the international dimension, at least as regards other main financial marketplaces.

The legal analysis will need to cover various strands of work: powers currently available to public authorities; comparisons and interdependencies with other jurisdictions/marketplaces; contracts currently used as standard in wholesale financial markets, especially as regards events of default, frustration, force majeure clauses and similar; business days; preventing others from taking unreasonable advantage.

The FMLC is the natural grouping to co-ordinate this legal analysis. It is likely that most market participants, infrastructure bodies and trade associations will happily contribute to this work. If there is wider work to be done, outside the legal sphere, the Bank of England was seen as the body best-placed to co-ordinate it.

It was indicated that those planning to respond to HMT's consultation will adopt a common approach consistent with this discussion.

### **Follow-up**

The views of the meeting will be reported to the FMLC, on behalf of which Keith Clark thanked those attending.

**April 2003**